Supreme Court, U.S.
FILED
MAY 8 2001
OFFICE OF THE CLERK

NO. 00-1103

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2000 TERM

MICHAEL D. STRICKLAND
Petitioner

v.

RICHARD DANZIG, Secretary of the Navy, VICE ADMIRAL DANIEL T. OLIVER, Chief of Naval Personnel, COMMANDER RICHARD LOTH, Commanding Officer, Special Boat Unit Twenty-Two, LCDR R. E. MILLER, Officer in Charge, Personnel Support Detachment
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Reply Brief to Respondent's Opposition to Petition for Writ of Certiorari

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John B. Wells
LA bar #23970
Attorney for the Petitioner
317 Portsmouth Drive
Slidell, LA 70460-8429
504-641-1855

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fifth Circuit Erred in Dismissing Petitioner's Appeal for Failure to Exhaust Administrative Remedies.

II. Whether the Fifth Circuit Erred in Denying Injunctive Relief As Moot When Relief Would Mitigate the Damage Suffered By the Petitioner.

III Whether the Fifth Circuit Erred In Denying Relief In Light of Petitioner's Right to Due Process.

IV. Whether the Navy Can Arbitrarily and Capriciously Discharge Petitioner.

V. Whether the Navy Can Discharge Petitioner When the Decision Is Unsupported by Substantial Evidence.

VI. Whether the Deference Afforded Military Decisions Should Attach to the Field Officers When Their Determinations Conflict With the Headquarters Staffs.

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Barto, *Judicial Review of Military Administrative Decisions After Darby v. Cisneros*, 1994-SEP ARMY LAW. 3 (Sep. 1994) 2

Smith, *The Military Personnel Review Act: Department of Defense's Statutory Fix for Darby v. Cisneros*, 1997-FEB ARMY LAW. 3 (Feb. 1997) 2

STATEMENT OF THE CASE

The petitioner adopts and incorporates his statement of the case as delineated in the petition for certiorari. The petitioner does note, however, the following discrepancies in the statement of the case articulated in the Solicitor General's opposition.

In their brief for the respondents, the Solicitor General fails to note that the petitioner plead *nolo contendere* to a misdemeanor charge only after being assured by Navy officials that they supported this plea and would take no action to administratively separate him. The Solicitor General also failed to note that the state court withheld adjudication in this matter, which is not considered a conviction in the State of Florida.

The Solicitor General's statement of the case indicated that the administrative board found misconduct. Actually, the initial findings of the board were that no misconduct occurred. After findings were announced the government representative (recorder) argued off record that the findings must be changed. The crux of this argument was that the *nolo* plea was binding on the board and that they (the board) were not free to determine whether misconduct had occurred. The board had no legal advisor and accepted the argument of the government attorney.

ARGUMENT

In their brief for the respondents the Solicitor General incorrectly opines that the Fifth Circuit decision does not conflict with the decision of other Circuits or this Court's decision in *Darby v. Cisneros* 509 U.S. 137 (1993). In his petition, the petitioner noted that the Federal Circuit has held that a resort to the military corrections boards is permissive not mandatory. *Heisig v. United States*, 719 F.2d 1153, 1155 (Fed.Cir.1983). The disparity between the Circuits in this case is critical since it is the Federal Circuit and their subordinate court, the United States Court of Federal Claims who often review the actions of the military correction boards. To allow such divergent rulings to stand can result in absurd and inequitable results. This is especially true since the Federal Circuit, unlike the other circuits, has held that seeking relief at a military correction board does not toll the running of the statute of limitations or create a new cause of action based on the board's decision to deny relief. *Hurick v. Lehman* 782 F.2d 984, 987 (Fed. Cir. 1986).

Nor can it be said that the actions of the Fifth Circuit below are not ripe for review because the decision was non-precedential. This decision reaffirmed the already existing law in the Fifth Circuit, as delineated in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) that administrative remedies must be exhausted.

Additionally, as noted in the petition for certiorari, the position of the respondents is inconsistent with the military's own commentators. Barto, *Judicial Review of Military Administrative Decisions After Darby v. Cisneros*, 1994-SEP ARMY LAW. 3 (Sep. 1994); Smith, *The Military Personnel Review Act: Department of Defense's Statutory Fix for Darby v. Cisneros*, 1997-FEB ARMY LAW. 3 (Feb. 1997)

Thus contrary to the Solicitor General's assertion, a major conflict among the Circuits is evident.

The Solicitor General further relied upon an environmental case, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 329-330 (1982) for the proposition that the courts should be able to ignore *Darby*, especially in the military environment. *Weinberger* was an environmental case in which the Administrative Procedures Act (APA) did not come into play and does not control here. Additionally, the decision noted that other means were available to achieve the statutory goal and other means were available to protect property rights. *Id* at 312. Here no such alterative remedy exists. An appeal to the correction boards is permissive and does not allow for a stay of the discharge action. 10 U.S.C. § 1552. Since the statute does not require an appeal to the correction boards, the principles of *Darby* control.

Nor should the petitioner be forced to resort to the Navy Discharge Review Board (NDRB). As with the Board for Correction of Naval Records (BCNR), an application to the NDRB is permissive rather than mandatory. 10 U.S.C. § 1553. Additionally, the NDRB cannot provide the relief sought by petitioner. It's authority is limited to upgrading discharges and cannot restore the petitioner to active duty with back pay or grant him retirement benefits. 10 U.S.C. § 1553. Since the relief that could be granted is at best *de minimus*, resorting to this remedy would be futile.

Although the Solicitor General chose not to address the question of whether the deference to military authorities should be imputed to the field commanders or the headquarters staffs, they did assert that the public interest would be harmed by judicial interference into military personnel decisions and that judicial review gives rise to separation of powers concerns.

Every high school civics course teaches that along with separation of powers comes "checks and balances." These two basic tenets of our Constitution work hand in hand to ensure that no branch wields too much power. Here, the

Solicitor General argues that the Congress delegated unbridled powers to the Executive in governing the military. This is not the case. Both 10 U.S.C. § 1169 and the Administrative Procedures Act limit the power of the Executive branch in this matter. The former requires the military to comply with the regulations promulgated by the service Secretary (32 C.F.R. Pt. 41 App. A and SECNAVINST 1910.4 series). The latter allows for judicial review of decisions that are arbitrary and capricious, unsupported by substantial evidence and contrary to the Constitution and laws of the United States.

Nor can the government explain how relief granted by correction boards could be less intrusive than judicial review. If the government assertion is correct and the correction board can make Strickland whole, how will the military suffer from similar action ordered by judicial decree. Judicial review will act to provide guidance to the military correction boards and to the military headquarters staff to ensure that personnel decisions are rendered in accordance with the Constitution and laws of the United States. This will reduce the number of future controversies such as the instant case.

The Solicitor General did not address the fundamental unfairness of inducing Strickland to plead *nolo contendre* on one hand then discharging him for following that advice. This inequity cries out for immediate relief.

Strickland's discharge was irrational. It was a lose/lose proposition. Strickland suffered severe damage that is growing worse every day. The Navy lost a trained petty officer and his local command was forced to cover his loss without replacement. If judicial review can prevent this type of injustice, then all will benefit.

Additionally, this Court must resolve the lack of consistency between the Circuits concerning the applicability of *Darby* and whether resort to correction boards is required.

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

John B. Wells
LA bar #23970
Attorney for the Petitioner
317 Portsmouth Drive
Slidell, LA 70460-8469
504-641-1855
504-649-1536 (fax)